United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2107

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ORIGINAL

JULIUS F. KLEIN,

Petitioner-Appellant.

-against-

No. 76-2107

HAROLD SMITH, as Superintendent of the Attica Correctional Facility, Attica, New York,

Respondent-Appellee.

B
P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF RESPONDENT

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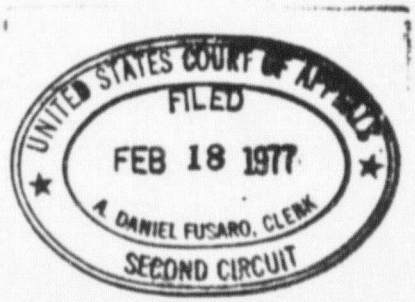

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-against-	:	No. 76-2107
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PRELIMINARY STATEMENT

This is an appeal from two orders of the United States District Court, Southern District of New York, (Owen, J.), the first order dated October 15, 1974,denying the petitioner's application for a writ of habeas corpus after an evidentiary hearing, and, the second order dated July 20, 1976, reaffirming the order of October 15, 1974 after a reopening of the evidentiary hearing.

STATEMENT OF FACTS

The petitioner was indicted on March 22, 1969 for the crime of murder in the first degree, the victim being Irene Brandt. Prior to this date, on February 20, 1969, William Reuther was also indicted for this same crime. After trial by jury in Supreme Court, Westchester County (Serignano,J.), the petitioner was found guilty as charged on October 15, 1969 and on March 23, 1970, he was sentenced to New York State Department of Correction for life. On December 20, 1971, the Supreme Court of the State of New York, Appellate Division, Second Department,affirmed the petitioner's conviction without opinion, and on February 14, 1973, the New York State Court of Appeals affirmed the conviction, also without opinion.

The Petition for Habeas Corpus -

On October 9, 1973, Julius Klein filed a petition for habeas corpus. In his moving papers, the petitioner alleged that his Sixth Amendment right to counsel was violated in that Edward Bobick represented himself and William Reuther on the murder charge, and, that prior to Reuther's guilty plea shortly before the petitioner's trial, he attended meetings with the petitioner and his attorney, Mr. Bobick, at which defense strategy was discussed. It is alleged that Reuther's presence at those meetings at a time when he was actually cooperating with the State, violated his constitutional right to effective assistance of counsel.

On December 12, 1973, Judge Ward ordered that a hearing be held in the District Court on this allegation and this matter went to a hearing before Judge Richard Owen on March 25, 26, April 1 and 9, 1974.

The Hearing -

STANLEY REGULA, Deputy Warden of the Suffolk County Jail, testified that on February 20, 1969 William Reuther was incarcerated in the Suffolk County Jail as the result of his indictment for the murder of Irene Brandt (H. 6-8)*. Reuther was represented by the firm of Bobick, Deutsch and Schlesser and while he was in jail, he was visited by either Mr. Bobick or Mr. Deutsch on a number of occasions during the year 1969 (H. 8-11). The records of the Suffolk County Jail also indicate that from February to September, 1969, (Petitioner went to trial in October, 1969), Reuther was visited by Detectives Pavese and Holmes and also that Reuther was removed from the jail by those Detectives on a number of occasions although the records of the jail do not indicate where the prisoner was taken or the time of his removal (H. 12-26). The records also indicated that there were at least thirteen requests by Reuther to meet with either assistant district attorneys or detectives associated with the Suffolk County District Attorney's Office although the records do not indicate whether those requests were granted (H.30-35). Finally, the jail records indicated that on September 20, 1969, William Reuther refused to see either Mr. Bobick or Mr. Deutsch, but there is

* H refers to Hearing Minutes dated March 25,26, April 1 and April 9, 1974

nothing indicating that he refused to meet with them prior to that time (H. 32, 36).

WILLIAM REUTHER, testified that he was indicted on February 21, 1969 and charged with the crime of murdering Irene Brandt (H.66-67). He indicated that from the time of his indictment until he pleaded guilty, a few weeks before the Klein trial commenced on October 8, 1969, he was represented by Mr. Bobick and that he met either with Mr. Bobick or Mr. Deutsch four or five times during this period (H.67-70, 89). Approximately a month after he was indicted, he requested and met with Maurice Nadjari, then Chief Assistant District Attorney of Suffolk County, because he wanted to "make a deal", but Nadjari told him that there would be no deals until he told everything he knew about the Brandt killing (H. 72, 85). After telling Nadjari what he knew, he testified against Julius Klein in the Grand Jury (H. 72-73). In return for his plea of guilty and his testimony against Klein, Nadjari promised that he would recommend to the Court that Reuther be given a sentence of no more than two to four years (H. 77-82). Reuther said that he did not tell his attorneys that he testified against Klein in the Grand Jury or that he had turned State's evidence and made a deal with Mr. Nadjari until he dismissed them in September of 1966 immediately beofre his plea of guilty (H. 73-77, 100, 109). During the period that he was incarcerated, Reuther admitted having conversations with both Charles Luchetti and William O'Gorman, both of whom were mutual friends of himself and petitioner,

Klein (H. 89-94). Reuther said that when he was visited by Mr. Bobick, Bobick did not discuss either defense witnesses or defense strategy with him, but only indicated that he and Klein had nothing to worry about since there was no evidence against either of them; he said that most of his discussion with Bobick centered upon an unrelated kidnapping case (H. 99-100, 110-113, 129). He never told his attorneys about his visits with members of the District Attorney's Office (H. 109). Reuther testified that he requested to see Mr. Nadjari after he lost confidence in Mr. Bobick and indicated that while he was in jail, he was informed of threats against him if he testified against Klein (H. 114-117, 120-125). He told Nadjari that he would not fire Bobick because he was afraid of his life and that he would, therefore, retain Bobick as his lawyer until the last possible minute before pleading guilty and testifying against Klein (H. 119-127). Finally, Reuther indicated that he never told Mr. Nadjari or anybody associated with the Suffolk County District Attorney's Office about the contents of any conversations he had with his attorneys (H. 129-130).

IRA A. DEUTSCH testified that he was the attorney for both Reuther and Klein and he had discussed the defense in detail with Mr. Reuther although he did not give any specifics as to those disclosures. He also confirmed that on September 19, 1969, Reuther for the first time refused to meet with him and that Reuther had never told him during any of their discussions that he was going to be a witness against Klein (H. 130-134).

EDWARD BOBICK, also the attorney for both Klein and Reuther, testified that he visited Reuther in the Suffolk County Jail where they discussed his and Klein's defense (H. 137-139, 144-145, 155-157). Bobick also confirmed that Reuther never mentioned he would be a witness against Klein and he indicated that Mr. Nadjari also never indicated to him that Reuther would be a People's witness (H. 140-149). Bobick said that he first became aware that Reuther had turned State's evidence approximately one month prior to Klein's trial when Reuther asked for new counsel (H. 149-150). Finally, he indicated that his firm represented Mr. Reuther as the result of a request by Mr. Klein (H. 152).

MAURICE NADJARI, Chief Assistant District Attorney of Suffolk County, testified that Reuther requested to speak with him subsequent to his own indictment, but prior to the indictment of Klein (H. 170-173). As a result of their discussion, Reuther agreed to plead guilty and to testify against Klein in return for which Nadjari promised to recommend a sentence of from two to four years - this agreement not being disclosed to Bobick until Reuther pleaded guilty a few weeks prior to the Klein trial (H. 173-178, 192). Reuther told him that he did not want his attorney to know of his cooperation with the District Attorney's Office and that he would not fire his attorney since this might indicate that he was cooperating and he feared Klein would kill him if Klein learned of their agreement (H. 180-181, 190-192). In fact, Reuther indicated to

Nadjari that he would refuse to testify as a State's witness if Mr. Bobick were told of the deal and Nadjari agreed to withhold that information from Bobick (H. 191-193). Nadjari testified that Reuther never told him of any of the discussions he had with his attorney and that he never learned, directly or indirectly, how the defense would proceed with the case against Reuther or Klein (H. 203-204, 210-214).

CHARLES LUCHETTI testified that he knew both Julius Klein and William Reuther and that he was a inmate in the Suffolk County Jail at the same time Reuther was incarcerated and awaiting trial on the Brandt murder charge (H. 222-226). He indicated that he spoke about the Klein case with Reuther and O'Gorman and that Nadjari had arranged for Reuther, O'Gorman and himself to meet in the Suffolk County Jail to influence him to cooperate with O'Gorman and Reuther and testify for the People against Klein (H. 226-229, 241). Luchetti said that he was going to testify as a witness for Klein and O'Gorman and Reuther attempted to persuade him not to do so indicating that as a result of their cooperation, Nadjari had agreed to have all their cases "taken care of" (H. 229-241). Luchetti further indicated that he eventually told Bobick that he would not appear as a witness for Klein because the District Attorney's Office had threatened to "bury him" in an unrelated kidnapping-extortion case if he did not cooperate with the District Attorney against Klein (H. 230-235). Luchetti testified that he knew both O'Gorman and Reuther were cooperating with the District Attorney "all along" but that he never told Bobick or Deutsch about their cooperation nor could

he explain why he failed to disclose this knowledge to Klein's attorneys, although he evidently said it had something to do with his pending cases (H. 236-246). Luchetti also indicated that he spoke with O'Gorman who told him that he was working with the Suffolk County District Attorney's Office and that he framed Klein on the Brandt murder for which he was paid five thousand dollars (H. 288-290).

Detective JOHN GALLAGHER indicated that he had known William O'Gorman for approximately six years and that O'Gorman had been an informant for the District Attorney's Office since 1968 (H. 300-303). Detective Gallagher testified that he had heard that John Klein Sr. had offered both Luchetti and O'Gorman five thousand dollars if they would testify in favor of the petitioner, but that he had never heard that the District Attorney's Office had offered O'Gorman five thousand dollars to frame Klein (H. 313-314). Detective Gallagher further testified that he never received any information from O'Gorman, Luchetti or any other persons concerning the defense plans in the Brandt murder trial (H. 319).

Memorandum and order of Judge Owens -

In an order dated October 15, 1974, Judge Owen's found that, after listening to all of the above testimony, there was absolutely no showing of any actual prejudice to the petitioner in his confidential relationship with his attorney. The Court found, as a matter of fact, that he credited the testimony of both Nadjari and Reuther denying that

that they had ever discussed Kleins defense, and that Nadjari never illicited any defense plans from Reuther. As to the conflict in testimony between the petitioner's attorney and William Reuther, the Court additionally found that it preferred to credit Reuther's more specific testimony in which he denied discussing Klein's defense plans with his attorneys and found, in any event, that even if such testimony of defense strategy had taken place, there was nothing indicating that Reuther had divulged any knowledge obtained to Nadjari. The Court denied petitioner's motion for a writ of habeas corpus.

Motion to Reopen Hearing -

Subsequent to the motion denying petitioner's writ of habeas corpus, a motion was made to reopen the hearing. This motion was based upon an affidavit by the petitioner, Julius Klein, in which he indicated that on September 5, 1974 both he and William O'Gorman met with Assistant United States Attorney Jaffe and that at this meeting O'Gorman admitted to the Assistant United States Attorney the facts indicating that he had cooperated with the Suffolk County District Attorney's Office to frame the petitioner. Specifically, it was alleged in petitioner's affidavit that O'Gorman admitted that he was told by Maurice Nadjari to inform the trial judge in the Brandt murder case that either Klein or members of his family, tried to bribe the jurors; that Detective Gallagher doctored a tape recording made with the petitioner to make

it appear that Klein was going to testify against William Reuther and also that O'Gorman claimed to have a tape recording on which Nadjari offered "a benefit" to him for his cooperation with the District Attorney against the petitioner; that Maurice Nadjari threatened Charles Luchetti not to testify as a witness for petitioner and that Nadjari also told O'Gorman to stay close to his attorney Bobick in order to find out everything that the defense was going to do, and that O'Gorman had intercepted a letter from the petitioner to his attorney which he then turned over to Maurice Nadjari.

As a result of this affidavit of the petitioner, Judge Owen granted a reopening of the hearing in order to take the testimony of William O'Gorman with regard to the allegations made in the petitioner's affidavit. This hearing was held before Judge Owen on May 27th, June 18th, July 13th and 20th, 1976.

Reopened Hearing -

WILLIAM O'GORMAN was called to the witness stand and when asked if he knew the petitioner, Julius Klein, he invoked the Fifth Amendment privilege against self-incrimination (J.2)*. When the Court inquired in what way this question could incriminate him, O'Gorman indicated that he would refuse to answer any questions at the hearing and that he wanted to consult with an attorney (J.2-3). When

* J refers to transcript of minutes dated May 22, 1976

petitioner's attorney Lawrence Kessler indicated that it was the duty of the Court to inquire whether the privilege was properly invoked, the Court indicated that it was the obligation of the Court to allow the assertion of the privilege as long as there was some arguable basis for its assertion, and the Court indicated that O'Gorman should speak with an attorney, and, accordingly, adjourned the hearing (J. 6-10).

When the hearing resumed on June 18, 1976, William O'Gorman appeared with Edward Chase, an attorney with the Federal Defender's Office who was assigned to O'Gorman to protect his Fifth Amendment rights. When O'Gorman was asked his address in the year 1969, he invoked his Fifth Amendment rights, but when the Court indicated that it could see no arguable basis for the assertion of the privilege and after O'Gorman conferred with his attorney, O'Gorman gave his Deer Park address (M. 1-8)*. O'Gorman indicated that in 1968-1969, he was incarcerated in the Suffolk County Jail on both grand larceny and kidnapping charges, and that as a result of his arrest by Detective Gallagher, he became an informant (M. 9-12). However, O'Gorman stated that prior to Kleins murder trial, he had not become an informant other than that he agreed to turn State's evidence and testify against Klein in a kidnapping case in which he was a co-defendant (M. 12-13).

* M refers to transcript of minutes dated June 18, 1976

O'Gorman testified that he visited William Reuther in the Suffolk County Jail after Reuther was indicted but he did not recall telling Reuther that he would cooperate with the District Attorney (M. 16-17). When asked whether he took a letter to Reuther which indicated that Klein would testify against him, O'Gorman invoked the Fifth Amendment privilege (M. 17). At this point, the Court had an in camera conference with both O'Gorman and his attorney Chase following which the Judge stated on the record that it was his belief that an answer to that question by O'Gorman might constitute part of "a chain of evidence" which would lead to his self-incrimination (M. 17-25). Petitioner's attorney asked the Judge to reconsider his ruling since any possible incrimination that would result would be barred by the statute of limitations, but the Judge responded that as a result of his in camera conversation with O'Gorman and his attorney, that the statute of limitations argument raised by petitioner's attorney was dispositive of the incrimination issue. O'Gorman again asserted his right of self-incrimination when asked if he discussed defense plans with any member of the defense team (M. 28).

JOSEPH JAFFE, Chief of the official corruption section of the United States Attorney's Office, was called to the stand for his recollection of O'Gorman's conversation as alleged in the Klein affidavit (P. 26-28).* With regard to Klein's allegation that O'Gorman had told

* P refers to transcript of hearing dated July 13 and 20, 1976

Jaffe that the District Attorney's Office had told him to lie to the Judge concerning Klein or his family bribing jurors, Jaffe testified that it was his recollection that O'Gorman had indicated he had told the Judge that the Klein family was happy with the jury and that he did not recall O'Gorman testifying that Nadjari had told him to lie (P. 27-32). Jaffe also did not recall any mention by O'Gorman concerning doctored tapes and that the tapes supplied to him by O'Gorman to which he listened which allegedly demonstrated the attempt by the prosecutor to frame Klein were either altered or did not contain what O'Gorman said they contained (P. 34, 38). According to Jaffe, O'Gorman did not say that Nadjari told him to threaten Luchetti not to testify as a witness for Klein and Jaffe said that he had no recollection that O'Gorman ever indicated that he was a "spy in the enemy camp" (P.37-38) Furthermore, he did not recall O'Gorman ever saying that Nadjari told him to spy on petitioner's attorney Edward Bobick (P. 38). Finally, Jaffe remembered O'Gorman alluding to some letter which he allegedly obtained from petitioner's attorney, but O'Gorman never produced it (P.40). The Assistant United States Attorney concluded by indicating that he did not consider O'Gorman a credibile person and he stated that according to his recollection, the information contained in Klein's affidavit was not accurate (P. 44-48, 64-66).

The Court indicated that it only accepted Jaffe's testimony concerning his recollection of the conversation with O'Gorman on the

question of O'Gorman's credibility were he to testify and indicated that he had heard nothing which supported the allegations contained in Klein's affidavit concerning the O'Gorman conversations (P. 53-55).

WILLIAM O'GORMAN resumed the stand and when he was asked whether a photostat of a "letter" sent to a friend of his (Mario Silvestri) in which he alleged Julius Klein was framed was prepared and signed by him, he invoked the Fifth Amendment, his attorney indicating that if he admitted that he had prepared the memo, it would be used against him in other criminal proceedings (P. 73-82). Mr. Kessler conceded that any verification by O'Gorman of the contents of the letter did, in fact, present a Fifth Amendment problem (P.78-81). The Court indicated that it could see the valid basis for O'Gorman's claim of his Fifth Amendment privilege in view of the fact that he had given sworn statements to prosecutors, which statements might have contained false statements, thereby subjecting him to criminal liability (P.82). Although O'Gorman admitted being in petitioner's attorney's office during the year 1969, he invoked his Fifth Amendment privilege to a series of questions concerning whether he had discussed Klein's defense with Mr. Bobick; whether he had provided any defense information to the District Attorney and whether he received any consideration from Mr. Nadjari in return for his cooperation with the District Attorney (P. 90-102). O'Gorman admitted making statements under oath to Mr. Nadjari on January 31, 1975 but refused to answer when asked, whether

The Court then concluded by stating:

> "The more I get into it, the more I conclude that this gentleman's testimony is not credible, is not believable and consequently, even - we never do get to what he says and already I am confident that whatever he would say is not believable.
>
> Having arrived at that conclusion, I do not see that there is a basis for me to change my initial view after an extensive hearing, hearing all of the principals ... I conclude that we have heard nothing from Mr. O'Gorman that would cause me to change my view at all and indeed I have heard nothing except that which indicates that Mr. O'Gorman is a man whom I would not rely upon even if I had something affirmative from him which I have not.
>
> Given that, I therefore deny the motion for a new trial which is an addendum I take it to the earlier motion which I had denied previously in an opinion. My comments here in the courtroom today constitute the court's findings of fact and conclusions of law sufficient for anybody's purpose." (P. 139-142)

POINT I

THE PETITIONER FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT THERE WAS AN INTENTIONAL INTRUSION OF HIS ATTORNEY-CLIENT RELATIONSHIP AND THE COURT CORRECTLY REJECTED THE PER SE RULE IN DISMISSING THE WRIT.

The principal contention of the petitioner is that both William Reuther, a co-defendant of the petitioner for the murder of Irene Brandt, and William O'Gorman, an informant of the Suffolk County District Attorney's Office, were "spys" in the defense camp who were "planted" by the prosecution in violation of petitioner's Sixth Amendment right to freely confer with counsel. Petitioner urges

that this Court adopt a per se rule and reverse his convicitons without any requirement on his part that he demonstrate prejudice.

It is well-settled that an intrusion by the government into the confidential relationship between a criminal defendant and his attorney is a violation of his right to counsel [Hoffa v. United States, 385 U.S. 293, 17 L. Ed. 2d 374 (1966); Black v. United States, 385 U.S. 26 (1966)]. However, while a "gross intrusion" into the confidentiality of the attorney-defendant relationship will madate a reversal of the judgment without any showing of prejudice by the defendant [United States v. Risdo, 460 F. 2d 965 (3rd Cir., 1972); Caldwell v. United States, 205 F. 2d 879 (D.C.Cir., 1953); Caplon v. United States, 191 F. 2d 749 (D.C. Cir., 1951)], this Court has consistently rejected the application of a per se rule where the record discloses that agents of the state participated in discussion of the defendant and his attorneys but where there is no showing that any information thus acquired was transmitted to the prosecution [United States v. Gartner, 518 F. 2d 633 (2nd Cir., 1975); United States v. Arroyo, 495 F.2d 1316 (2nd Cir., 1974); United States v. Rosner, 485 F. 2d 1213 (2nd Cir.,), cert denied 417 U.S. 950 (1974); United States v. Mosca, 475 F. 2d 1052 (2nd Cir., 1972); in accord, United States v. Zarzour, 432 F. 2d 1 (5th Cir., 1972); United States v. Crow Dog, 399 F.Sup.228 (U.S.D.C., Iowa, 1975); United States v. Cohen, 358 F. Supp. 112 (S.D.N.Y., 1973)]. Stated in another manner, it is only where the record clearly indicates both that the state "intruded" into the attorney-client relationship of the defendant and that information

was transmitted to the prosecutor as a result of this intrusion, that the courts will find a "gross intrusion" requiring a per se reversal of the defnedant's conviction without any demonstration of actual prejudice on his part.

In any event, the record in the instant case indicates that the petitioner has not only failed to demonstrate that any defense strategy was communicated to the prosecutor as the result of planting an informant in the defense camp, but further that petitioner has failed to show that any informant was, in fact, planted by the prosecutor to participate in the preparation of his defense. Since the burden of proof in a federal habeas corpus proceeding reviewing a state court conviciton was on the petitioner to prove his claim by a preponderance of clear and convincing evidence [28 U.S.C. Section 2254(d); see, United States ex. rel Schuster v. Herold, 410 F. 2d 1071 (2nd Cir., 1969)], it is submitted that the petitioner's conviction for the murder of Irene Brandt should not be disturbed, even if this Court were to adopt the petitioner's view of an expanded application of a per se rule.

In his original moving papers seeking habeas corpus relief, the petitioner alleged that his Sixth Amendment rights were violated by the participation of William Reuther in defense strategy meetings with himself and Edward Bobick, Esq., attorney for both the petitioner and Reuther on the murder charge, at a time when Reuther had made an agreement with the prosecutor to be a witness for the state against the petitioner.

At the evidentiary hearing on this allegation, William Reuther testified that although he met with Edward Bobick, Esq., on several occasions after he began cooperating with the prosecutors, they never discussed defense witnesses or strategy in the murder case and Bobick confined his references to that case to general statements that he and Klein had nothing to worry about since there was not sufficient evidence against either of them; Reuther stated that most of their conversations centered around an unrelated kidnapping case in which both he and Klein were defendants (H. 99-100, 110-113, 129). William Reuther also testified that he never told Mr. Nadjari or anyone else connected with Suffolk County District Attorney's Office about his conversation with his defense attorneys (H. 129-130). Maurice Nadjari also testified at the hearing and unequivocally stated that Reuther never told him the content of any conversation he had with his and Klein's attorneys and that he was never told directly or indirectly how the defense would proceed with the murder case (H. 203-204, 210-214).

Despite the testimony of Klein's attorney that they had discussed the defense with Reuther, Judge Owen found, as a matter of fact, that Reuther never discussed defense plans with the defense attorneys and the Judge also specifically credited the testimony of both Nadjari and Reuther denying that they had ever discussed Klein's defense. Since these findings of fact cannot be said to be "clearly erroneous", they are binding upon this Court under the Federal Rules of Civil Procedure [28 U.S.C.,Rule 52], which rule has specifically been held to apply in habeas corpus proceedings

[see, Brown v. Swenson, 487 F. 2d 1236 (8th Cir.,) cert. denied 416 U.S. 944 (1973)]. Additionally, it should be noted that the record does not support, nor is the contention advanced by petitioner, that the indictment against William Reuther was a "sham" indictment. The testimony at the hearing demonstrates that it was Reuther who decided to cooperate with the prosecution in order to get a "deal" for himself (H. 72, 85, 170-173). Furthermore, Reuther testified that he continued his "representation" by Klein's attorney because he had heard of threats against his life if he testified against Klein and he was afraid that firing Bobick would indicate cooperation (H. 114-127). Nadjari confirmed that Reuther failed to discharge Bobick because he was afraid of Klein and Reuther indicated to Nadjari that he would not cooperate if his cooperation were disclosed to Bobick (H. 180-181, 190-193). On these facts, Reuther's continual presence in the "defense camp" was neither an "intentional intrusion" initiated by the prosecutor nor could it be characterized as "unjustifiable." Thus, even according to the argument advanced by the petitioner, a per se rule would not be applicable here (see Appellant's brief, at p. 17).

Subsequent to the dismissal of the petitioner's writ of habeas corpus, a motion to reopen the hearing based upon newly discovered evidence was made by the petitioner, the new evidence being that William O'Gorman, an informer for the Suffolk County District Attorney's Office, was paid by Maurice Nadjari to "spy" on the defense camp and report to him everything dealing with the defense strategy.* This motion was based on a sworn

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* The allegation that petitioner's right to counsel was violated by O'Gorman's activities on behalf of the prosecutor was never presented to the state courts either on direct appeal or by collateral attack.

affidavit by the petitioner that he was present in the office of an Assistant United States Attorney Jaffe with O'Gorman when O'Gorman admitted to Jaffe that he had cooperated with Suffolk County District Attorney's Office to "frame" Klein and that he was paid to do so.

Although O'Gorman would not testify, the Court had Joseph Jaffe, the federal prosecutor to whom O'Gorman was alleged to have made the statements contained in Klein's affidavit, testify to his recollection of O'Gorman's statements to him. Jaffe stated that he had no recollection of O'Gorman saying that he was a spy in the petitioner's defense camp or that Nadjari told him to spy on petitioner's attorney (P. 34-38). After reviewing all the allegations in Klein's affidavit, Jaffe stated that the information contained in Klein's affidavit was not accurate (P.44-48, 64-66). The Court also admitted as exhibits a photostat of the letter of O'Gorman in which he stated that he was paid to frame Klein as well as an affidavit given by O'Gorman to Nadjari in which he sworn that Nadjari never solicited his cooperation to intrude upon the petitioner's relationship with his attorney (P. 113-118). The Court indicated that, in view of the conflicting statements given by O'Gorman, he could not be considered a credibile witness and that the Court would not overturn the murder conviction on the basis of a letter written by so incredible a person (P. 137).

It is submitted that the finding of the Court that O'Gorman was not a credible witness, together with the testimony of Jaffe indicating that the statements contained in the petitioner's affidavit

were not accurate amply support the conclusion that the petitioner did not sustain his burden of proving his allegations by clear and convincing evidence and, therefore, the Court properly refused to upset the petitioner's conviction.

POINT II

THE DISTRICT COURT PROPERLY ALLOWED O'GORMAN TO EXERCISE HIS PRIVILEGE AGAINST SELF-INCRIMINATION

The petitioner further contends that the District Court acted improperly when it permitted William O'Gorman to exercise his privilege against self-incrimination since there was no reasonable danger that the witness could incriminate himself by his answers.

While it is true, as petitioner states, that the privilege against self-incrimination can only be invoked by a witness in those instances where the witness has reasonable cause to apprehend danger from a direct answer [United States v. Llanis, 398 F. 2d 880 (2d. Cir.), cert. denied 393 U.S. 1032 (1969)], it is also clear that the courts have given the privilege a broad interpretation in favor of the right it is intended to secure [Manes v. Meyers, 419 U.S. 449, 42 L. Ed. 2d 574 (1975); Counselman v. Hitchcock, 142 U.S. 547, 35 L. Ed. 1110 (1892)]. The privilege applies not only to answers which would directly incriminate the witness, but also to any answers which would furnish a link in the chain of evidence in a

prosecution [Manes v. Meyers, supra; Blau v. United States, 340 U.S. 159, 95 L. Ed. 170 (1950)] and it is sufficiently broad to permit a witness from disclosing to the court in camera the substance of the answers which he claims would incriminate him [see, 8 Wigmore, Evidence, Section 2271, p. 419 (McNaughton rev. 1961)]. It is for the court, not the witness, to determine whether the witness has properly invoked the privilege and the criterion to be applied in making this determination is that the court must find from a careful consideration of all the circumstances in the case that it is perfectly clear that the witness is mistaken and that the answers could not possibly have a tendency to incriminate him [Malloy v. Hogan, 378 U.S. 1, 12 Ed 2d 653 (1964); Hoffman v. United States, 341 U.S. 479, 95 L. Ed. 1118 (1951); Rogers v. United States, 340 U.S. 367, 95 L. Ed. 344 (1950); United States v. Chandler, 380 F. 2d 993 (2d Cir., 1967)]. To sustain the privilege it need only be evident from the implication of the questions, in the setting in which it was asked, that a reasonable answer to the question, or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result [Hoffman v. United States, supra].

The record in the instant case discloses that Judge Owen was well aware of the law in regard to a witness asserting his privilege against self-incrimination and the court was careful to ascertain whether there was a good faith basis for the assertion of the privilege by William O'Gorman. Thus, when O'Gorman took the witness stand at the hearing and invoked the privilege, the Court noted in response to a request by petitioner's attorney

that the witness could not be compelled to answer as there was a basis for the claim and the Court ordered that an attorney be appointed to confer with O'Gorman on the basis for his claim (J. 2-10). When O'Gorman resumed the stand with an attorney present and claimed his privilege when asked about his cooperation with the prosecution in the petitioner's case, the Judge adjourned to chambers with the witness and his attorney to ascertain a good faith basis for the claim before sustaining the claim on the ground that the witness' answers could provide a link in the chain of evidence leading to his prosecution (M.17-25,P.90-102). When the petitioner's attorney argued that the witness be compelled to testify on the ground that the statute of limitations would bar his prosecution, the Court indicated that after confering with the witness and his attorney, the Court did not feel that the statute of limitations would be dispositive of the issue. After O'Gorman invoked the privilege when asked about the contents of a letter written to Mario Silvestri and about a sworn affidavit given to Nadjari, the Court noted that a good faith basis existed for the assertion of the privilege due to the fact that it appeared the witness was giving contradictory and sometimes sworn statements to various prosecutorial agencies and that the witness' answers could give rise to prosecution due to any falsehoods in the various statements (P. 82).

The records clearly indicate not only that the Court was careful in ascertaining that the witness had a good faith basis for his ascertion of the privilege, but also that it is highly probable that

O'Gorman had given contradictory statements to different prosecutors, thereby subjecting himself to charges of perjury. A Judge's ruling sustaining the privilege as claimed in good faith should not be reversed by an appellate court in the absence of manifest error [Russell v. United States, 12 F.2d 683 (CA 6th Ohio), cert. denied 272 U.S. 709 (1926)]. In this case, to the contrary, the Judge's ruling is amply supported by the record.

POINT III

THE PETITIONER WAS NOT PREJUDICED BY THE DISTRICT COURT'S REFUSAL TO ALLOW HIM TO CALL CERTAIN WITNESSES

Petitioner contends that he was prejudiced by the rulings of Judge Owens which precluded his calling as witnesses Mr. Justice George Aspland who was the District Attorney of Suffolk County during the petitioner's murder trial, and Investigator Doonan who was present at the conversation between O'Gorman, Klein and Jaffe, which conversation served as the basis for the information contained in the petitioner's affidavit to reopen the hearing. Although petitioner alleges that these witnesses would provide relevant testimony, he fails to allege what that testimony would be or in what manner he was prejudiced by their absence.

With regard to the request to call Mr. Justice Aspland as a witness at the hearing, petitioner's attorney indicated that the only

reason he wanted to call the former Suffolk County District Attorney was to ask him if he had received a copy of the letter which O'Gorman had sent to Mario Silvestri in which he indicated that he was paid to frame Klein. It is submitted that this testimony would be irrelevant since, even if a copy of the letter was sent to the Suffolk County District Attorney, this fact would not be corroborative of the truth of the allegation contained therein, nor would it constitute evidence on the issue of O'Gorman's credibility. Therefore, the trial court properly refused to allow Judge Aspland to be called as a witness.

As for the request that Mr. Doonan testify at the hearing, this request was based upon the testimony of Assistant United States Attorney Jaffe that he spoke with Mr. Doonan, an investigator with his office, in refreshing his recollection about his conversation with O'Gorman at which Klein was present (P. 42). The Court declined to have Doonan testify at the hearing indicating that Jaffe's hearsay testimony was taken, not to prove the truth of any material issue of fact, but merely to aid the Court in its determination of the collateral issue of O'Gorman's credibility. Thus, the Court could not be said to have abused its discretion in prohibiting testimony which would merely have constituted additional hearsay testimony on a collateral issue. It should be noted that the record reflects that Jaffe consulted with Doonan on five or six aspects of the petitioner's case and it would appear that Doonan's recollection of the conversation with O'Gorman differed from Jaffe's only on the one issue of what O'Gorman told Judge Serignano concerning any attempt to bribe jurors at the petitioner's murder trial (P. 42-43).

POINT IV

THE DISTRICT COURT PROPERLY DENIED THE MOTION OF THE PETITIONER TO BE PRESENT AT THE REOPENED HEARING

The final contention of the petitioner is that the Court committed reversible error in denying petitioner's motion to be present at the reopened hearing.

The Court has the duty to order the production of a habeas corpus petitioner and the petitioner has the right to be present at the hearing where there are material questions of fact to be litigated, but his physical presence is not required when there are no material questions of fact to be resolved [28 U.S.C. Section 2243; Walker v. Johnston, 312 U.S. 275 (1941); United States ex rel. DeFillo v. Fitzpatrick, 378 F. 2d 85 (2d Cir. 1965); United States ex rel. Griffin v. McMann, 310 F. Supp. 72 (E.D.N.Y., 1970); Robinson v. Henderson, 316 F. Supp. 1241 (D.C. La., 1970)].

In the instant case, the petitioner filed a sworn affidavit alleging that certain statements were made by O'Gorman to Assistant United States Attorney Jaffe in petitioner's presence and the District Court reopened the hearing for the sole purpose of taking the testimony of O'Gorman concerning the allegations contained in the petitioner's affidavit. However, when O'Gorman was sworn as a witness he invoked his privilege against self-incrimination and, therefore, nothing said by O'Gorman created a material issue of fact. As for Jaffe's testimony, his hearsay recollection of O'Gorman's statements were not admitted for the truth of

what occured but merely to aid the Court on the issue of O'Gorman's credibility. Furthermore, Jaffe's testimony was confined to how his recollection of specific statements allegedly made by O'Gorman compared with the petitioner's recollection as contained in petitioner's sworn affidavit before the Court. Since Klein's recollection of the conversation was before the trial court and Jaffe's recollections were not admitted for the truth of what was said, it is submitted that there was no material issue of fact to be resolved by the Court which necessitated the petitioner's physical presence in the courtroom.

Under these circumstances, the Court properly denied petitioner's motion to be present at the reopened hearing.

CONCLUSION

THE ORDER OF THE DISTRICT COURT DENYING THE PETITIONER"S WRIT SHOULD BE AFFIRMED.

Dated: Riverhead, New York,
February 16, 1977

Respectfully submitted,

HENRY F. O'BRIEN
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Attorney for Respondent-Appellee

CHARLES M. NEWELL
KEVIN J. CROWLEY
Assistant District Attorneys
of Counsel

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) SS.:
COUNTY OF SUFFOLK)

Roberta M. Culver, being duly sworn, deposes and says:

That on the 17th day of February, 1977, she served the within Brief of Respondent-Appellee upon the defendant, JULIUS KLEIN through his attorney, LAWRENCE KESSLER, ESQ. by depositing a true copy of same securely enclosed in a postpaid wrapper in the post office letterbox, official depository maintained and exclusively controlled by the United States, at the County Center, Center Drive, Riverhead, Suffolk County, New York 11901, directed to said defendant's attorney, LAWRENCE KESSLER, ESQ. at Hofstra Law School, Hempstead, New York 11550 that being the address within the State designated by him for that purpose upon the preceding papers in this action, or the place where he then kept an office between which places there was and now is a regular communication by mail.

Deponent is over the age of eighteen (18) years.

Roberta M. Culver

Sworn to before me this
17th day of February, 197

Rosanne Profeta

ROSANNE PROFETA
NOTARY PUBLIC, STATE OF NEW YORK
COUNTY OF SUFFOLK
NO. 52-461-9808
COMMISSION EXPIRES MARCH 30, 1977